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### REMARKS

Claim 1, as well as claims 2 – 7, and 10 dependent thereon, and claim 11, as well as claims 12 – 15, and 18 dependent thereon, have been amended to provide an all natural, nutritionally fortified ready to eat vegetable yogurt and method of manufacturing same. Claims 1 and 11, as well as claims 2 – 7, 10 and claims 12 – 15, and 18 dependent thereon, respectively, have been amended to emphasize rapid cooling of the vegetables after cooking, that the cooked vegetables are cold when pureed into a smooth uniform consistency, and that the same is added to cold plain yogurt so that the vegetable does not undergo fermentation. Moreover, amended claims 1 and 11, as well as claims 2 – 7, 10 and claims 12 – 15, and 18 dependent thereon, respectively, specifically require that no preservatives or artificial additives be added to the ready to each vegetable yogurt to further recite an all natural vegetable yogurt product fortified with 40 – 60 percent by weight of vegetables. Inasmuch as language in independent claims 1 and 11 directed to “*cooled*” pureed vegetables has been amended to “*cold*” pureed vegetables and further bring out that the vegetables are rapidly cooled before pureeing, and that the vegetables are pureed to form a cold vegetable puree with a smooth, uniform consistency, language in claims 2, 10 and 18 have been amended. The amendments to claims 1 and 11, as well as claims 2 – 7, and 10 and 12 – 15, and 18 dependent thereon, respectively, are clearly supported by the original specification, particularly at: “*Summary of the Invention*” page 12, lines 19 – 23; page 13, lines 20 – 23; page 14, line 15; “*Description of the Preferred Embodiments*” page 15, lines 7 – 19; and page 16, lines 21 – 23.

The ready to eat vegetable yogurt required by applicant’s current claims 1 and 11, as well as claims 2 – 7, 10 and claims 12 – 15, and 18 dependent thereon, respectively, comprises

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cooked pureed vegetables that are rapidly cooled and pureed to from a cold smooth vegetable puree. The claims require that this cold smooth vegetable puree be blended with cold plain yogurt and natural additives. Applicant's present claims 1 – 7, 10, 11 – 15 and 18 require that no artificial additives and no preservatives be added to the ready to eat vegetable yogurt. Applicant has found that adding cold pureed vegetables to cold plain yogurt, and maintaining cold temperatures, prevents the yogurt from fermenting the vegetable and thereby preserves taste and nutritional properties of the vegetables. Applicant's current claims require that the cooked pureed vegetables range from 40 to 60 percent by weight. The weight percent required by applicant's present claims provides a vegetable yogurt having a significant weight percentage of vegetables without the presentation of preservatives or other non-natural additives, thereby yielding a highly nutritional food packed with essential vitamins, minerals, and fibers inherent in the vegetable utilized.

Summary of Examiner's Rejection:

The Examiner has rejected claims 1 – 7, 10 – 15 and 18 in applicant's response dated March 5, 2007 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

The Examiner has maintained the rejection of previously presented claims 1 – 7, 10 – 15 and 18 under 35 U.S.C. §103(a) as being unpatentable over Japanese Patent No. 61231958 to Hara, Japanese Patent No. 55007013 to Kazutada et al., Japanese Patent No. 3112454 to Masahiro et al., and Great Britain Patent No. 2294625 to Oliver.

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Examiner's Consideration of Applicant's Previously Filed Arguments:

The Examiner has stated that Applicant's arguments contained in the Response filed March 5, 2007 have been fully considered but not found persuasive. Particularly, the Examiner has pointed to Applicant's argument that the prior art does not teach the claimed percent and that the claims omit the use of a stabilizing agent. The Examiner also notes that applicant does not exclude additional components from the prior art. In the absence of unexpected result, the Examiner has stated that the use and manipulation of vegetable and percents is well-within the skill of the art and merely a matter of choice. The Examiner has stated that the prior art clearly teaches the addition of vegetables to yogurt, and that in the absence of a showing to the contrary, Applicant is using known components to obtain no more than expected results.

The Examiner has indicated that the *Action is Made Final* on the last page (page 5) of the Action. However, both the Office Action Summary and PAIR indicate that the Rejection is Non-Final. As the Action is a first action on the RCE, the Action contains a new ground of rejection necessitated by the amendments in the RCE, form paragraph 7.41 has not been used by the Examiner, and the Office Action Summary and PAIR each indicate the action is non-final; applicant interprets the action as non-final and that the paragraph utilized by the Examiner was unintended.

Rejection under 35 U.S.C. §103(a):

The Examiner has maintained the rejection of previously presented claims 1 – 7, 10 – 15 and 18 under 35 U.S.C. §103(a) as being unpatentable over Japanese Patent No. 61231958 to Hara, Japanese Patent No. 55007013 to Kazutada et al., Japanese Patent No. 3112454 to

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Masahiro et al., and Great Britain Patent No. 2294625 to Oliver.

In keeping with the Examiner's previous rejection, the Examiner has stated that Hara, Kazutada et al., Masahiro et al., and Oliver disclose a yogurt comprising vegetable. (Hara, abstract; Kazutada et al., abstract; Masahiro et al., abstract; and Oliver, entire document, especially pages 1 and 3). The Examiner has further stated that the Applicant's claims differ as to the recitation of specific cultures, percents and a cooling step. As to specific yogurt cultures, the Examiner has stated that it is notoriously well-known in the art and used for their art-recognized purpose. As to the percents of vegetable to yogurt claimed by Applicant, the Examiner has stated that, in the absence of showing to the contrary, the amounts claimed are seen to be no more than a matter of choice, dictated by preference, and well-within the skill of the art.

The Examiner has stated that it would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use conventional yogurt cultures and the claimed [vegetable weight] percents in that of Hara, Kazutada et al., Masahiro et al., or Oliver because the use of conventional cultures and preferred [vegetable] amounts is well-within the skill of the art. The Examiner further concluded that once the art has recognized the addition of vegetable products to yogurt, the use and manipulation of types of vegetables and percents employed is merely a matter of choice and well-within the skill of the art. Moreover, the Examiner has noted that once removed from heat, the cooling process of a vegetable is inherent, and that the immediate cooling of products to prevent overcooking is conventional.

The ready to eat vegetable yogurt required by applicant's current claims 1 and 11, as well as claims 2 - 7, 10 and claims 12 - 15, and 18 dependent thereon, respectively, comprises

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cooked pureed vegetables that are rapidly cooled and pureed to form a cold smooth vegetable puree. The claims require that this cold smooth vegetable puree be blended with cold plain yogurt and natural additives. Applicant's present claims 1 - 7, 10, 11 - 15, and 18 require that no artificial additives and no preservatives be added to the ready to eat vegetable yogurt. Applicant has found that adding cold pureed vegetables to cold plain yogurt, and maintaining cold temperatures, prevents the yogurt from fermenting the vegetable and thereby preserves taste and nutritional properties of the vegetables. Applicant's current claims require that the cooked pureed vegetables range from 40 to 60 percent by weight. The weight percent required by applicant's present claims provides a vegetable yogurt having a significant weight percentage of vegetables without the presentation of preservatives or other non-natural additives, thereby yielding a highly nutritional food packed with essential vitamins, minerals, and fibers inherent in the vegetable utilized.

The Examiner has stated that applicant's claim differ as to the recitation of specific cultures, percents and a cooling step. As to the percents of vegetable to yogurt claimed by Applicant, the Examiner has stated that, in the absence of showing to the contrary, the amounts claimed are seen to be no more than a matter of choice, dictated by preference, and well-within the skill of the art. However, Applicant respectfully submits that the amounts are not merely a matter of choice, but have been found to provide a product where the vegetables remain stable and unfermented when blended with the yogurt, while the art teaches to the contrary. Namely, the art applied teaches that the addition of vegetables to yogurt requires preservatives and additives in order to stabilize the vegetables and prevent fermentation and degradation. Each of the references to show that the references, taken either alone or in combination, do not teach or

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suggest all the claim limitations, and therefore any combination of same would not teach or suggest all the claim limitations of Applicant's invention. (MPEP 2142, "Establishing a *Prima Facie* Case of Obviousness", first paragraph). Each reference applied by the Examiner teaches the addition of an agent to a food product having vegetables and yogurt in order to provide the function of stability to the food product, and that Applicant's claims omit the use of a stabilizing agent while at the same time retaining the omitted element's (stabilizing agent's) function. (MPEP 2144.04 II B, "*Omission of an Element with Retention of the Element's Function Is an Indicia of Unobviousness*"). As such, indicia of unobviousness has been shown by the applicant.

Hara discloses the addition of fermented bean past (MISO) and / or fermented milk product, such as yogurt (NYUFU), to a food product (such as vegetable), in a ratio of ~3pts. MISO / NYUFU to 100pts. food product so that the MISO/NYUFU acts as an agent to retard the freeze-denaturation of the food product. Kazutada et al. discloses a process wherein finely cut or ground vegetables, extracts, juices, *heated or cooked vegetables* are added to yogurt *before* fermentation and a gelatinizing agent is added, wherein the addition before fermentation and the gelatinizing agent are added in order to provide stabilization to the vegetables via soften fermentation odor and improved flavor. Masahiro et al. discloses a process for formulating a vegetable food product comprising the mixing of vegetables, yogurt and a gelling agent appointed to suppress the grassy smell of vegetables and improve the taste and flavor. Lastly, Oliver discloses a vegetable type yogurt wherein rosaceous fruit, 9 to 31 weight percent, is added as a stabilizing agent acting as a preservative for the yogurt food product.

Under MPEP 2144.04 II B, the omission of an element and retention of its function is

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indicia of unobviousness. In re Edge, 359 F.2d 896, 149 USPQ 556 (CCPA 1966). In Edge an applicant's claims were directed to a printed sheet having a thin layer of erasable metal bonded directly to a sheet wherein the thin layer obscured the original print until removal by erasing. The prior art in Edge disclosed a similar printed sheet further comprising an intermediate transparent and erasure-proof protecting layer which prevented erasure of the printing when the top layer was erased. The Court in Edge held that although the transparent layer taught by the prior art was eliminated, the function of the transparent layer was retained by the applicant, and therefore the applicant's claims were found unobvious. As in Edge, Applicant's claims 1 – 18 provide a vegetable yogurt that omits an element of the prior art references, while at the same time retaining the element's function.

Applicant's claims 1 – 18 require that cold vegetable puree and cold yogurt be utilized and that no preservatives or artificial additives be added. Unlike the art applied, applicant's food product is stable in the yogurt so that no preservatives are needed. Thus Applicant's claimed invention provides for the omission of the stabilizing agent, while at the same time provides for the retention of the stabilizing agent's function which is achieved by adding the vegetables in a cold pureed state. Moreover, applicant has carried out a consumer survey demonstrating impending commercial success of applicant's food product. The survey questioned consumers as to the taste, texture, overall appeal, and likelihood of purchasing the product. A scale of 1 – 5 was utilized, with 5 being the highest score indicating a positive score. Four flavors were available for testing: carrot, broccoli, butternut squash and sweet potato. Sixty-two recorded samples of the vegetable yogurt of applicant's present claims were given out, with about forty non-recorded samples. Taste, texture, overall appeal and likelihood to purchase

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all scored high, averaging approximately 4+ on the scale from 0 to 5. Average score for likelihood to purchase the food product was 4.09 out of 5.

The addition of a sizeable weight percentage of pureed vegetables, as called for by applicant's present claims 1 – 18, is carried out under cold conditions as the cooked vegetable are rapidly cooled when at least one frozen vegetable is added thereto and mixed to form a cold pureed vegetable that is blended with yogurt so that degradation of the vegetable's nutrients is minimized. The addition of cold pureed vegetables to a yogurt is not taught or suggested by the prior art workers, including Hara, Kazutada et al., Masahiro et al., or Oliver. Nor is the combination of combining cooked vegetables and at least one frozen vegetable taught or suggested by the prior art workers, including Hara, Kazutada et al., Masahiro et al., or Oliver. Moreover, the addition of cold pureed vegetables in amounts ranging between 40 to 60 weight percent is not disclosed or suggested by any prior art worker, including Hara, Kazutada et al., Masahiro et al., or Oliver.

Rather, the prior art teachings, including Hara, Kazutada et al., Masahiro et al., or Oliver suggest that preservatives and the like (rosaceous fruit; jellies; etc.) must be added to vegetable yogurt preparations in order to stabilize the flavoring. None of the prior art references, including Hara, Kazutada et al., Masahiro et al., or Oliver teach a ready to eat vegetable yogurt that utilizes a combination of cooked and frozen vegetables and a 40 to 60 weight percent of cold vegetables without the addition of preservatives and the like. Clearly, such a sizeable addition of cold pureed vegetable is a not merely a matter of choice. For the amount of vegetable required by Applicant's claims 1-18 and the requirement that the vegetables be added in a cold pureed state constitute elements that function to yield a highly nutritional food product that is



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nutritionally stable and viable without the need for the addition of stabilizing agents.

Accordingly, reconsideration of the rejection of claims 1 – 7, 10 – 15 and 18 under 35 USC §103(a) as being unpatentable over Hara, Kazutada et al., Masahiro et al., and/or Oliver is respectfully requested.

Rejection under 35 U.S.C. §112, first paragraph:

The Examiner has rejected claims 1 – 7, 10 – 15 and 18 in applicant's response dated March 5, 2007 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The Examiner has stated that the claims contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. Specifically, the Examiner has stated although the specification teaches "at least one frozen vegetable added to said cooked vegetables" to form a mixture, the application does not teach "at least one frozen vegetable added to said cooked vegetables" to form a mixture as had been required by applicant's previously submitted amended claim 1.

In order to expedite prosecution of the application, applicant has amended claim 1 to remove the requirement that at least one frozen vegetable be added. As such, applicant submits that Examiner's rejection based under 35 U.S.C. 112, first paragraph, has been obviated.

Accordingly, reconsideration of the rejection of claims 1 – 7, 10 – 15 and 18 under 35 U.S.C. 112, first paragraph, is respectfully requested.

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**CONCLUSION**

In view of the amendments to the claims and the remarks set forth above, it is respectfully submitted that the present application is in allowable condition. Reconsideration of the rejection of claims 1 – 7, 10 – 15 and 18, and their allowances are earnestly solicited.

Respectfully submitted,  
Marina Shereshevsky

By 

Ernest D. Buff  
(Her Attorney)  
Reg. No. 25,833  
(908) 901-0220

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